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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROBERT DALE HIGGINS, Appellant.	)	2 CA-CR 2009-0374 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700698

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Tom Horne, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 Robert Higgins appeals from his convictions and sentences for child molestation, indecent exposure in the presence of a minor, tampering with evidence, and

sixteen counts of sexual exploitation of a minor. He asserts there was insufficient evidence to support his molestation and exploitation convictions and the trial court erred in giving the jury a supplemental instruction defining "indirect manipulation." We affirm.

¶2 On appeal, we view the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). While using Higgins's desktop computer in October 2007, his girlfriend B. found and viewed a portion of a recently recorded video depicting Higgins and his then-four-year-old daughter, T. In the video, Higgins was naked, while T. was wearing only a t-shirt. Higgins, while masturbating, approached T. and appeared to speak to her, at which time she "went on all fours" and turned her "buttocks . . . towards him." Higgins then reached his hand toward her genitals and, according to B., "it looked like he had actually touched her genital area," although B. also stated she "didn't actually see" Higgins "touch [T.'s] area" because T.'s "leg was in the way" and B. therefore could not see his hand. B. stopped the video before it ended and called Higgins, threatening to contact law enforcement. Higgins then returned to his house, and when B. asked him "if he had done it," he responded that he wanted to "explain." B. then left, telling Higgins that she was going to report him.

¶3 After B. spoke with police officers, she agreed to make a recorded telephone call to Higgins. During that call, Higgins tacitly admitted he had touched T. inappropriately but explained he had only done it once and it had been a mistake. Pursuant to a search warrant, police officers searched Higgins's home and, although they did not find his desktop computer, they found a laptop computer. A computer forensics expert discovered on the laptop computer's hard drive ten photographs and four videos

depicting child pornography, all involving unknown victims. Police officers later found Higgins at a hotel and arrested him. Officers found Higgins's desktop computer in his hotel room, but the hard drive had been removed and thrown away and Higgins had installed a replacement.

¶4 Based on the video B. had seen on Higgins's desktop computer, Higgins was charged with sexual conduct with a minor under the age of fifteen, child molestation of a child under the age of fifteen, indecent exposure, and two counts of sexual exploitation of a minor under the age of fifteen. He was also charged with tampering with physical evidence. Related to the files found on the laptop computer, Higgins was charged with fourteen counts of sexual exploitation of a minor. All but the tampering charge were alleged to be dangerous crimes against children pursuant to former A.R.S. § 13-604.01, now renumbered as A.R.S. § 13-705.[1]

¶5 Pursuant to the state's motion, the trial court dismissed without prejudice the sexual conduct charge. It denied Higgins's motion for a judgment of acquittal as to the other counts. After a seven-day trial, the jury convicted him of the remaining counts and, where applicable, found the victims to be under the age of fifteen, rendering the offenses dangerous crimes against children. § 13-705(P)(1)(d), (g).

¶6 The trial court sentenced Higgins to presumptive, consecutive and concurrent prison terms for the crimes related to T., totaling fifty-two years. For the sexual exploitation convictions based on files found on Higgins's laptop computer, the court sentenced him to fourteen additional consecutive, partly mitigated, 12.5-year prison

[1]The Arizona criminal sentencing code has been amended and renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective "from and after December 31, 2008." *Id.* § 120. Because these amendments included no substantive changes material here, see *id.* §§ 17, 29, 119, we refer to the renumbered statute.

terms. The combined sentences resulted in a total prison term of 227 years. This appeal followed.

Sufficiency of the Evidence

¶7 When addressing a challenge to the sufficiency of the evidence, we view the facts in the light most favorable to sustaining the verdict and resolve all inferences against the defendant. *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). And, it is the jury's function to weigh all of the evidence and to assess witness credibility. *State v. Reynolds*, 108 Ariz. 541, 543, 503 P.2d 369, 371 (1972); *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004). Furthermore, in reviewing the record to determine whether substantial evidence existed to support a conviction, there is no distinction between circumstantial and direct evidence. *See State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993).

¶8 Higgins first argues insufficient evidence supported the molestation and exploitation charges related to the video recording of T. because B. had "turned off the video before she actually saw [him] touch [T.]" and therefore there was no evidence he actually did so. He ignores, however, that during the confrontation call with B. he tacitly admitted touching T. by stating, among other things, that he had not touched anyone else's children. Combined with B.'s testimony, that admission plainly would permit the jury to infer he touched T.'s genitals and therefore was guilty of molestation. *See* A.R.S. §§ 13-1410(A); 13-1401(2).

¶9 And we reject his contention, raised for the first time in his reply brief, that there was insufficient evidence to support his exploitation convictions because T. did not "engag[e]" in any sexual conduct in the video. *See* A.R.S. § 13-3553(A)(1), (2). Even taking as true his questionable proposition that, under the statute, a minor must take some active role rather than be a passive victim, B. testified that T.—apparently at Higgins's direction—turned her buttocks to face Higgins so that he could touch her genitals. Thus, T. was plainly engaged in sexual conduct, and the jury could conclude Higgins committed exploitation of T. by video recording the events B. described and saving that recording to his computer's hard drive.

¶10 Higgins also argues insufficient evidence supported his fourteen exploitation convictions based on the images and videos found on his laptop's hard drive, asserting there was no evidence he knowingly possessed those images and, even if the jury could conclude he possessed those images, there was no evidence he knowingly possessed them during the time alleged in the indictment—on or about October 21, 2007. As to these images, in order to find Higgins was guilty of sexual exploitation of a minor, the jury had to conclude he knowingly "[d]istribut[ed], transport[ed], exhibit[ed], receiv[ed], s[old], purchas[ed], electronically transmitt[ed], possess[ed] or exchang[ed] any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct." § 13-3553(A)(2). Here, the question is whether Higgins possessed or received the images at the time alleged in the indictment because there is no evidence he otherwise violated the statute.

¶11 Higgins admitted the laptop computer was his and that he had used it, although the computer had not been used since September 2005. And the evidence showed it had been used to access child pornography websites. This evidence clearly

supports the inference that Higgins used the computer to access those websites. Although Higgins testified he had permitted others to use his computer and was unaware of the images it contained, the jury could reject his testimony if it chose. *See State v. Hall*, 204 Ariz. 442, ¶ 55, 65 P.3d 90, 103 (2003) ("The credibility of witnesses . . . is a matter for the jury.").

¶12 Six of the images and three of the videos found were stored in the desktop computer's internet browser's temporary directory where images and other data from websites viewed by a user using the browser are stored. Two images were found in a "thumbs.db" file in a folder bearing Higgins's name. The thumbs.db stored miniaturized copies of images kept in the same folder to display the icons linked to the full-sized pictures on the computer. The full-sized versions of those images were not found and apparently had been deleted. Two other images were found in "unallocated space," on the hard drive, meaning the images had been deleted so they did not appear to the user, most likely from the browser's temporary directory, but remained on the hard drive. The fourth video was found in another temporary folder on the computer.

¶13 We observe there was no evidence Higgins received the images on or about October 21, 2007, because the computer had not been used since 2005. Higgins argues he did not knowingly possess the images at that time, reasoning the images either had been deleted or were inaccessible to the typical computer user because they were stored in hidden folders on the computer. We find his reasoning unpersuasive. A defendant knowingly possesses images stored in temporary directories or unallocated space if there is evidence he or she had accessed websites containing child pornography and was aware images or videos from those websites would be stored there by the computer's operating system or internet browser. *See State v. Jensen*, 217 Ariz. 345, ¶ 12, 173 P.3d 1046, 1051

(App. 2008) (suggesting user knowingly possesses child pornography if aware "computer . . . automatically download[ed] the images onto the hard drive"); *see also United States v. Kuchinksi*, 469 F.3d 853, 862 (9th Cir. 2006) (defendant did not knowingly possess images in temporary directory because no evidence he was "sophisticated" computer user, had tried to access images, or "even knew of the existence of the cache files"); *United States v. Romm*, 455 F.3d 990, 1001 (9th Cir. 2006) (defendant possessed child pornography when he had "ability to control the images while they were displayed on his screen" and knew "images were saved to his disk" by automatic operation of computer); *United States v. Bass*, 411 F.3d 1198, 1202 (10th Cir. 2005) (defendant knowingly possessed cached images when he attempted to remove them); *United States v. Tucker*, 305 F.3d 1193, 1204-05 (10th Cir. 2002) (defendant "knowingly acquired and possessed" child pornography when he deleted images from browser cache).

¶14 A computer expert testifying on Higgins's behalf opined that most computer users understood that images and other traces of websites they had visited were stored on the computer. And there was evidence Higgins was an experienced and knowledgeable computer user. Additionally, Higgins's former wife testified that in 2001 she had discovered an image on Higgins's computer depicting a minor child engaged in sexual conduct with an adult. When confronted, Higgins denied knowing about the image but later removed and disposed of the computer's hard drive. And Higgins similarly disposed of the hard drive in his desktop computer, which contained at least one video recording of him engaging in sexual conduct with T.

¶15 As the trial court correctly noted, a jury could infer from this evidence that Higgins was aware that images or other files from websites he had visited were stored in hidden files on those hard drives and that destroying or disposing of the hard drive would

ensure those images could not be found. Thus, because the jury reasonably could conclude Higgins had accessed websites containing child pornography using the laptop computer and he was aware that images and files from those websites would still be stored on the laptop's hard drive in 2007, it also could conclude he knowingly possessed the images found during the time alleged in the indictment.

Supplemental Jury Instruction

¶16 Last, Higgins argues a supplemental jury instruction regarding the definition of "indirect manipulation" relevant to the molestation charge was unsupported by the evidence and was "unconstitutionally vague." *See* § 13-1401 ("sexual conduct" includes "indirect touching, fondling, or manipulating"). The trial court instructed the jury it could find Higgins guilty of molesting T. if he "intentionally or knowingly engaged in any direct or indirect manipulation of [T.]'s vulva." During deliberations, the jury asked the court to define "indirect manipulation." After discussion with the parties, the court opted to instruct the jury that "[i]ndirect manipulation means manipulation other than by direct touching." It rejected Higgins's proposed instruction that "indirect manipulation means to tamper with, change, or alter the condition of something without a direct touching."

¶17 We review a trial court's decision to give a particular instruction for an abuse of discretion, *see State v. Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d 883, 885 (App. 2004), but review de novo whether jury instructions properly state the law, *see State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). In making the latter determination, we review the instructions the court gave as a whole. *See State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). Thus, "[a] case will not be reversed

because some isolated portion of an instruction might be misleading." *State v. Guerra*, 161 Ariz. 289, 294, 778 P.2d 1185, 1190 (1989).

¶18 Insofar as Higgins suggests there was no evidence he "indirectly" touched T., we agree. There was no evidence he either had used an object to touch her or touched her through her clothing. *See State v. Pennington*, 149 Ariz. 167, 168, 717 P.2d 471, 472 (App. 1985). But Higgins did not object to the trial court's instruction that the jury could find him guilty on the basis of indirect contact, nor does he raise that argument on appeal. In any event, the jury was directed that it might find some instructions inapplicable. The record demonstrates the supplemental instruction was given because it was unclear to the parties whether the jury was requesting clarification of the term "indirect" or the term "manipulation," and the court thought the supplemental instruction might prompt the jury to ask a more precise question. We find no abuse of discretion in that procedure, and the supplemental instruction was not an incorrect statement of the law.

¶19 And, although Higgins conclusorily asserts the supplemental instruction "gave the jury the opportunity to convict based on pure speculation as to whether [he] actually touched his daughter," he does not explain this argument adequately. We find nothing in the supplemental instruction that could have prompted the jury to decide this case on an improper basis. Similarly, although Higgins contends the instruction was unconstitutionally vague, he neither explains this argument nor supports it with citation to authority. *See* Ariz. R. Crim. P. 31.13(c)(l)(vi) (appellate brief argument shall contain "citation to the authorities, statutes and parts of the record relied on"). We therefore do not address it further. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument on appeal). The trial court did not abuse its discretion in giving the supplemental instruction.

¶20 For the reasons stated, we affirm Higgins's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge